No. 12987

e United States Court of Appeals for the Ninth Circuit

ORNIA ELECTRIC POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

BRIEF FOR RESPONDENT

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1952.

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SDICTIONAL COUNTERSTATEMENT

a proceeding under Section 313(b) of the Federal [1] to review an order of the Respondent Commission the Petitioner Company to cease and desist from two wholesale customers in Nevada any rate other d rates." That is to say, from charging any rate the one embodied in the contract the Company had e filed with the Commission for its sale to Mineral ower System and the rate in the contract it should e have filed for its sale to the Naval Ammunition awthorne, Nevada, under the terms of filing require- hich the Commission determined were applicable. expressly provided, however, that such "filed rates" ntrol only "until and unless * * * duly super- new rates filed by the Company or by rates fixed by

351; 16 U. S. C. § 825l(b). In lieu of printing as an appendix the numerous provisions of the Act which we cite, we are the Clerk printed pamphlet copies of the Act for more conven- ce.

. Part 35; Federal Power Act §§ 205(c), 205(d), 20, 309. Rele-

counting requirements with respect to the excesse
"filed rates" which had been collected by the Comp
certain rulings on admissibility of evidence; and de
tion to reopen the record (R. 110–112, 146–148).
(R. 84–112) is reported in 89 PUR NS 359.[4]

Commission jurisdiction, insofar as here quest
conferred by the provisions of the Federal Power A
larly Sections 205(c) and 205(d) for regulation of ra
by "public utilities" in selling power at wholesale in
commerce; Section 20 of that Act providing for re
rates of licensees whose electric power enters inter
merce, and adopting the procedure and practice of
state Commerce Act in fixing and regulating railr
and Section 309, providing for issuance of orders,
regulations necessary or appropriate to carry out
sions of the Act.

The Company does not controvert the jurisdict
Commission to conduct the proceeding, to decide th
raised therein, and to issue an order accordingly.
that it is generally subject to regulation under the

[3] Petitioner describes the order as requiring it to cease and
charging Mineral County rates other than the previously filed
or until such rates were superseded by order of F. P. C." and f
Navy any rates other than those set forth in the last contra
Commission found should have been filed, and which it directe
Co. Br. 4; Petition, R. 624–625; see also Co. Br. 70. But the f
of the Commission's order (R. 110–112) left the Company c
liberty, either immediately or at any later time, to file higher r
in 30 days (or earlier for good cause) subject only to the usu
generally applicable to all changes in filed rates. Sections 205
18 C. F. R. § 35.3(c). The Commission had previously permit
rate schedule filings to become effective as of dates prior to
E. g., R. 604, 585, 589. The filing provisions of the Act and t
to those in the Interstate Commerce Act are discussed in *North*
Co. v. *Montana-Dakota U. Co.*, 181 F. 2d 19 (C. A. 8), *affirm*
246, 251–252.

[4] The order incorporates (R. 103) the Commission's opinion
The opinion (R. 95) refers to and reaffirms the conclusion previ
in *Safe Harbor Water Power Corporation* (5 F. P. C. 221, 66
affirmed, 179 F. 2d 179 (C. A. 3), *certiorari denied*, 339 U. S.

utility" within the special meaning of that term
Part II (Co. Br. 6). Its objections run only to the
on's decision that the rates in question are subject
ssion filing requirements, that the Company should
he rates which it had attempted to raise without
with filing requirements, and that it charge only

It also objects to Commission rulings on admissi-
vidence and on a motion to reopen the record.
ttempting a more detailed statement of the issues
by the petition for review, some correction of the
atements in Petitioner's brief and some augmenta-
of is desirable to show how the issues arose after
any had acquiesced in a long course of Commission
dverse to the Company's present contentions.

LEMENTARY STATEMENT OF THE CASE

ministrative interpretation. For over 13 years the
ged by the Company and its corporate predecessor
to Mineral County were filed without questioning
ability of the Commission's filing requirements.[5]
l herein shows that many of the Company's filings
ent or former name (see notice of change of name,
ere permitted by the Commission to become effec-
dates prior to the dates upon which they were filed
604, 585, 589). In those cases the Company (the
rporation) did not, as it now suggests (Co. Br. 69),

filing took effect January 20, 1936 when the Commission's
nplementing Sections 205(c) and 205(d) first became effective.
e by the Company's immediate corporate predecessor, The
rra Power Company. The Company continued to file all new
l amendments, at first under its then corporate name of The
ornia Electric Corporation until it changed its name by amend-
cate of incorporation in 1941, and thereafter under its present
5–615, 165–166, 404–412). The service rendered and the rate
e defined in the contracts, and all F. P. C. filing requirements
l by filing the contracts—the usual practice under the Federal
where a single or very few customers receive the same service.
ere made in accordance with legal advice given the Company

initiated the new practice of expressly making its effective as of a date prior to the filing date, subje faction of the Commission's filing requirements (R 587, 408).[7] In those cases the Commission did n not disapprove the Company's filings, or abstain pending them, but affirmatively asserted its jurisd them by issuing orders pursuant to the last sentence 205(d) of the Act and Section 35.3(d) of its Rules (§ 35.3(d)), waiving the advance notice requirement ing the rates to become effective as of the contract

Furthermore, in 1940, upon very similar jurisdict the Commission had exercised authority over the under its then corporate name to regulate a rate c City of Los Angeles, and the Company had acquies Commission's decision reducing that rate. *City o geles* v. *The Nevada-California Electric Corporation* 104, 32 PUR NS 193.

Attempts to change rates without filing new When the Company on October 15, 1948, submitted proposed rate applicable to Mineral County, represe percent increase (R. 241), the Commission by four letters over a period of six months repeatedly requ mission of the additional data required by the rules sary to permit a preliminary check of the justificati increase (R. 88–89). At length the Company (whic viously been granted a corresponding increase in by the California Commission) on March 22, 1949 its incomplete submittals, instead of furnishing the data (R. 88–89). Shortly afterward the Compan report for 1948, filed May 2, 1949 (Certified Transcri

[6] For an example of that practice, see R. 610–615.

[7] Those provisions, according to the Company's Vice Pres Delvaille, were included because the Company's "legal staff f necessary at that time" (R. 376). A Company letter dated D 1939 and signed by the same G. C. Delvaille explicitly state "This schedule covers an agreement for an interstate sale at w resale between The Nevada-California Electric Corporation and

disclosed that it had received revenues from Mineral
hich could not be reconciled with the last completed
;, and the Commission, under date of June 8, 1949,
an explanation of the discrepancy (R. 579). Re-
o answer, the Commission made a further request
e of July 20, 1949 (R. 580).

ly (R. 565) signed by the Company's Vice President
lvaille under date of August 4, 1949, the Company
at since August 1, 1948 [8] it had been charging and
from Mineral County at a higher rate. The Com-
ner stated that it was billing the Navy at an increased
that the Navy had refused to pay at the higher rate.
pany continued to serve the Navy under a "letter of
ated June 29, 1949, by which the Navy had under-
ay "the old rates with the provision that, if a differ-
ere thereafter agreed upon or fixed by any regulatory
ng jurisdiction in the premises, such new rate should
n October 1, 1948" (R. 566–568).

mpany's letter went on to say that the Company be-
t the service and rates were subject to regulation by
rnia Commission [9] "for the reason that all of the
livered to Mineral County Power System * * *
ed in one or more projects licensed" by the Commis-
Sections 19 and 20 of the Federal Power Act provide
and service in such cases are to be fixed by State
ns, if any, even though the energy enters into inter-
merce." Also that transmission by both customers
pt under Section 201(f) of the Act and hence the
s sales to them were not in interstate commerce. It
that the Company would "await a contrary order, if
sue" (R. 568–569).

---

e was subsequently admitted to be erroneous, the correct date
r 5, 1948 (R. 368).

earing Vice President Delvaille declared that he "would not
y as to say that we were advised [by the Company's legal staff]
obligated" to file the Mineral County rate with the Federal
ission (R. 379–380). Mr. Delvaille further testified that he

mental application to the California Commission fo
applying the "P–2" and "P–3" rate schedules to these
a hearing was held by that Commission Octobe
(R. 151–152).

In December, following the California Commissi
ing on the supplemental application, Mineral Cou
a letter to the Federal Power Commission complai
it had been overcharged more than $12,000, and that
charge was continuing at the rate of approximately
month. It sought refund of the excess and restorat
filed schedule "until such time as permission to ch
schedule has been authorized by the proper
(R. 537–538).

Commission proceedings. After correspondence
California Commission, before which the Company
mental application then remained pending, the Fede
Commission issued a "show cause" order [10] initiati
ceeding to determine the applicability of its filing req
to both the Mineral County and Navy rates (R. 1–
order also set a hearing to be held concurrently with
of the hearing being held by the California Commiss
under a plan of cooperative procedure previously
between the Power Commission and State Commi
C. F. R. § 1.37).

The order expressly provided that other interes
Commissions might participate, either by holding a
hearing under the same plan, or as intervenors (R.
Nevada Commission responded to notice of that sh
order, stating that it would not participate but wou
representative attend as an interested party only (R
and it did so (R. 153–156, 183–184, 186–188).

In the Commission's proceeding appearances wer
and briefs and reply briefs filed with the Commissi

[10] A "show cause" order is provided by the Commission's rules
for initiating a proceeding. 18 C. F. R. § 1.6(d).

[11] This recital of facts discloses the lack of foundation for th

, Mineral County, the California Commission, the
d the staff of the Federal Power Commission, sev-
. 13–14). Exceptions to the Examiner's Decision
with the Commission for Mineral County, the Navy,
staff of the Federal Power Commission, severally
3). Applications for rehearing were filed with the
on by the Company and the California Commission
32) and denied (R. 146). Only the Company peti-
Court review (R. 623), and the 60-day period in
h a petition could be filed by the California Com-
as expired.

rstatement of the questions presented. We would
questions presented as follows:

respect to Commission jurisdiction over these rate
der Part II of the Act (relating to regulation of
wholesale" "in interstate commerce" made by "public
—

ne Company, which is a "public utility," impliedly
s a licensee from rate filing requirements under

these sales "in interstate commerce" notwithstand-
ction 201(f) exemption of the purchasers?
these sales "sales at wholesale" under Part II?
these sales excepted by the Section 201(b) exception
s "used in local distribution"?
h respect to Commission jurisdiction under Part I
to licensees)—
s the power here "enter into interstate commerce"
e meaning of Section 20, and is that Section ap-
o the exclusion of Section 19?
the Commission properly find the lack of qualified
missions which is prerequisite to Commission regu-
der Section 20?
d the termination of the contracts bar the Commis-
ordering the rates, therein set forth and not can-
hanged, to be adhered to, or to be filed where not

SUMMARY OF ARGUMENT

In view of the number of questions which we
the Argument it seems desirable that this Summ
lective rather than comprehensive. So also, the la
of cases we rely upon impels us here to omit duplic
tions thereto for the most part. We shall merely
convey an impression of the trend of our argument,
to define its scope.

I

None of the Company's four objections to Commi
diction under Part II to require filing of rates for
discloses any error.

A. As an admitted "public utility" subject as su
regulation under Part II of the Act, the Company is
from rate regulation under that Part, by reason of
a licensee under Part I. Directly in point are *So*
W. P. Corp. v. *F. P. C.* (179 F. 2d 179 (C. A. 3)
denied, 339 U. S. 957) and *Pennsylvania W. & P. Co.*
(— F. 2d —, C. A. D. C. Nos. 10,236, 10,239, 10,5
July 3, 1951, *certiorari granted*, February 4, 1952),
Commission regulation of rates of licensee-"publi
over objections that licensees are wholly exempt fro
II regulation. The grounds of those decisions are
fully applicable to the narrower claim of exemption

B. The Section 201(f) exemption "from the pro
Part II of the Company's two publicly owned purch
not extend to exempt the privately owned Company
sales to them. Petitioner's theory that the purcha
mission of the energy out of state becomes nonexis
Section 201(f) is contrary to the uncontroverted evi
one cannot exist without the other, and contrary
201(c) of the Act which provides that "energy sh
to be transmitted in interstate commerce if transmit
state and consumed at any point outside thereo
regard to who owns or operates the facilities

nship by which two definitions of the Act tacked to
r literally exempt sales to these purchasers (the Navy
unty agency) was not intended by Congress to have
lt. It should not be given that effect because that
wart a clearly defined major purpose of the Act. The
t course of administrative interpretation is opposed
xemption and an argument based on the same literal
of the Act has been overruled *sub silentio* by the Su-
urt. *Connecticut L. & P. Co.* v. *F. P. C.*, 324 U. S. 515.
e to the Navy is not removed from Commission juris-
nder the plain terms of the Act and applicable de-
the circumstances under which the resales are made;
fact that a larger part of the energy is not resold, the
king it clear that the Commission's jurisdiction is not
ed "upon any particular volume or proportion" (*Con-
L. & P. Co.* v. *F. P. C.*, 324 U. S. 515, 535–536); or by
hat the Company does not contract for or intend the
be made (*Jersey Central P. & L. Co.* v. *F. P. C.*, 319
68–73).

se two Company *sales* are not withdrawn from Com-
egulatory jurisdiction by the Section 201(b) exception
es "used in local distribution." They are indistin-
from the sale held constitutionally beyond state rate
jurisdiction in *P. U. C.* v. *Attleboro S. & E. Co.* (273

The rate regulatory provisions of Part II were en-
ill that gap in electric utility regulation. Transmis-
he Company over distances up to 80 miles, and 50
ther by the purchasers, from isolated hydroelectric
remote communities, cannot properly be held to be
tribution" (*F. P. C.* v. *East Ohio Gas Co.*, 338 U. S.
470).

II

mpany's objections to Commission jurisdiction under
equally without merit. That the electric power is
astate commerce where taken across the state bound-

Section 20 was intended to apply to all sales in inter
merce to the exclusion of Section 19, as shown by it
It is not clear whether Congress in Section 20 in
authorize state regulation of licensee's rates in inter
merce by interstate compact where such rates lie o
constitutional power of the states under the comme
But in any event there are two threshold requiremen
regulation of rates under the terms of Section 20: (1)
tion provides its own standard of lawful rates whic
enforced by an agency provided for that purpose b
(2) Enforcement must be the result of agreement th
properly constituted authority of each state. Here
no agency properly constituted by one of the states
Hence, the prerequisite to Commission regulation
terms of that Section is clearly met.

The Commission's order merely directs the Comp
charge any other rate than its last legally filed, uncan
unchanged rate for its sale to Mineral County, whi
may legally charge in any event. The Company '
no rate as a legal right other than the filed rate
Montana-Dakota U. Co. v. *Northwestern P. S. Co.*,
246, 251. For the sale to the Navy, for which no rat
been filed, the order merely directed filing of the
actually being paid, defined in the contract claime
been terminated. The Company, by unsuccessfully
ing to collect a higher rate without complying with
filing requirements, could not entitle itself to the h
Cf., Armour Packing Co. v. *United States*, 209 U.
Company counsel recognize that there is here no ques
fairness of the rate.

IV

From the nature of the evidence involved in the c
Commission rulings it is clear that the rulings could
been prejudicial and could not invalidate the Cor
order under Section 308(b).

ARGUMENT

I

GUMENTS ADVANCED TO AVOID COMMISSION G REQUIREMENTS UNDER PART II DISCLOSE ROR BY THE COMMISSION

f the four claims advanced by the Company to avoid g with the Commission filing requirements under Part Act has been considered and rejected by the Commis- previous cases, and by the appellate courts where before them. None of those claims or the Company's g arguments will be found to disclose any error in the ion's decision here under review or any reason for g the prior decisions.

ompany Is Not Impliedly Exempt as a Licensee From Rate Filing Requirements Under Part II

ing that it is both a licensee under Part I of the Act 7–8) and a "public utility" subject to regulation as er Part II "as to certain activities, such as accounting issue of securities, sale of property, etc." (Co. Br. 6), pany devotes a large part of its argument (Co. Br. –48) to the contention that nevertheless, as a licensee, ubject to regulation under Part II with respect to these . Br. 33, 42). The Company sums up what it wants (Co. Br. 44–45): "Licensees simply form a class to nether engaged in intrastate or interstate commerce or tions 19 and 20 of the Act apply. The rate regulatory of Sections 205 and 206 of Part II apply to others nsees."

c Utility" Is Not Exempt From All Regulation Under Part II Where It Is Also a Licensee

ompany's present admission that it is subject to some n as a "public utility" under Part II reflects a nar- aim than has previously been considered by the

claims of complete exemption of licensees from a
regulation. *Safe Harbor W. P. Corp.* v. *F. P. C.*, 179
(C. A. 3), *certiorari denied,* 339 U. S. 957; *Pennsylv*
P. Co. v. *F. P. C.*, — F. 2d — (C. A. D. C. No
10,239, 10,531), decided July 3, 1951, *certiorari gra*
ruary 4, 1952. We think it will be simpler for us
the Company's claim by first briefly reviewing the re
the broader claims were denied, and second, showing
reasons apply as well to the present claim for exemp
from Sections 205 and 206 of that Part.

The *Safe Harbor* case, *supra,* was a proceeding to
Commission order reducing Safe Harbor's rates by so
000, annually. The Safe Harbor Company, a license
within the Part II definition of "public utility," cla
to be subject to any regulation under Part II as a "p
ity" because it said that as a licensee it was subject
tion under Part I and entitled to have its rates, am
activities, regulated under Sections 19 and 20 of Part
those Sections, it argued, the reasonableness of its ra
be tested by a different standard (fair return on an
ciated investment rate base) from that which the Co
had used under a judicially approved interpretatio
II (fair return on a depreciated investment rate bas
a licensee it had a vested right to have its rates regula
the Part I standard. Safe Harbor also contended, as
pany does here, that it was entitled to State regula
rates under Sections 19 and 20, because the Comm
erred in finding that the states directly concerned we
to agree."

The Third Circuit overruled both of Safe Harbor
tions and held the Commission's rate order to be v
Commission's jurisdiction under both Parts I and I
the Company's first claim, the Court held that the
substantive conflict between Parts I and II becaus
visions of Part I prescribed no different standard
rates than that prescribed by Part II (179 F. 2d at

tion 20 and consequently that the Commission had
n. It added (179 F. 2d at p. 185, note 10):

* * certain portions of Parts I and II are incon-
ent with each other unless we, or some other court,
l a rational reconciliation as we think we have done.
he provisions of the respective Acts cannot be recon-
d then the former must be deemed to be repealed
the latter. *Cf.* our earlier opinion, 124 F. 2d at
ges 803–804.

or certiorari based on the same two contentions was
the Supreme Court (339 U. S. 957).

Penn Water case, *supra,* another licensee-"public
gain advanced the same two contentions in seeking
f Commission orders under both Parts I and II re-
rates by approximately $2,000,000 annually. In
the Court of Appeals for the District of Columbia
lso overruled both contentions. That Court went
an the Third Circuit; it noted as to the first conten-
he Third Circuit had pointed out the essential same-
ne rate base requirements of Parts I and II (slip
10–11), and went on to hold that the provisions
action in Part I do not require reading "an implied
for licensees into Part II" (slip sheet, p. 9). A brief
its reasons should be of help in the present proceed-
question discussed in the next section of this brief,
ner an exception should be implied for licensees from
ular provisions of Sections 205 and 206.

y terms expressly apply. The opinion of the Court
s for the District of Columbia Circuit starts with
nat the express language of Part II contains no ex-
th respect to licensees. It points out that the con-
omission of licensees from among the express
s in Section 201(f) tends to negative an implied
(slip sheet, p. 9):

t seems unlikely that Congress would not have in-
ded so important a group as federal waterpower

to point out (slip sheet, p. 9) that the only judicial in point, the two *Safe Harbor* cases in the Third C opposed to any such exception of licensees, and tha in the two other cases upon which the Penn Wate relied did not involve Part II or discuss the po conflict between Parts I and II.

Legislative history shows applicability. The op tinues (slip sheet, p. 9) by showing that legislative Part II also supports application of Part II to lic refers to the fact that the House Committee Repor stated that licensees would be included amor utilities."

Exception would create nonuniformity. Finally points out (slip sheet, p. 10) that when Congress i cided to provide a new system of federal regulatio interstate commerce in electric energy, application tem to nonlicensees alone would have resulted in n ity: different treatment of licensees and nonlicens same kinds of transactions. Congress, the Court therefore made the new system of federal regulation to licensees as well as nonlicensees and to that ex seded any conflicting provisions for state regulati I which, in the absence of any general scheme of fe lation of electric utilities in 1920, had placed primar upon state regulation in order to make treatment as much like that of ordinary public service cor possible.

Resolution of conflict not necessary where the correctly found "unable to agree." Independently going considerations, the Court reviewed and uphel mission's determination that Section 20 itself gave mission jurisdiction inasmuch as the states were agree (slip sheet, p. 11), as the Third Circuit had *Harbor* case, *supra.*

t II Is Not Impliedly Exempted as a Licensee From Regulation tions 205 and 206

mit that the principles upon which the *Safe Harbor Water* cases were decided are sound and require re- the Company's present narrower claim of exemption ions 205 and 206.

205(a) expressly applies to "*All* rates and charges by any public utility for * * * sale of elec- y subject to the jurisdiction of the Commission." 06(a) expressly applies to "*any* rate (or) charge by any public utility for any * * * sale subject isdiction of the Commission." Other subsections of 05 are similarly phrased. Thus these Sections are made applicable in the same terms as the entire Part apply to every "public utility," a term which, by 01(e) is expressly given the same constant meaning d in this Part or the Part next following." In fixing ing "sale subject to the jurisdiction of the Commis- ed with the same meaning as in Sections 205 and 206, Section 201(b) which provides that "The provisions *t* shall apply to the * * * sale of electric energy le in interstate commerce (etc.)." "Sale of electric wholesale" is also given the same constant meaning ed in this Part" (Section 201(c)). Subsection (f) e Section 201 provides express exceptions which also ne for all of Part II: "*No* provision of this *Part* shall (etc.)." (The enumeration which follows does not ensees.) [12]

ch as the key terms defining the applicability of Sec- nd 206 are the key terms determining the scope of all and have the same constant meaning throughout that nat the District of Columbia Court of Appeals found ress terms of Part II, in prior judicial utterances, and ve history is equally pertinent here.

is what that Court said as to the purpose of Con- roviding a new system of Federal regulation, to make

by all "public utilities," whether or not licensees. T
ticularly pertinent in the present case. For these ra
appropriately regulable by the Commission as they w
charged by a company which was not a licensee but
all of its energy by steam plants. Moreover, if lice
lic utilities are subject to *security* regulation under Se
as the Company admits (Co. Br. 6), it seems who
sistent with any concept of uniformity to say that th
subject to *rate* regulation under Sections 205 and 20
same provision is made for state regulation of both i
19 and 20.

If the Court upholds our present contention, it sho
the Commission's jurisdiction to issue the order, reg
whether or what it decides about the Commissio
diction under Part I. If we are correct in the cont
make below (pp. 32–40) that the Commission, rathe
States, had jurisdiction under Section 20, this Court s
hold the order on that ground, regardless of whether
our present contention, or leaves the question undec
and this we think more appropriate, the Court may u
Commission's jurisdiction on both legs.

**B. These Sales Are "In Interstate Commerce" Notw
ing the Section 201(f) Exemption of the Purc**

In adopting many of the arguments heretofore mad
companies seeking to avoid Commission regulation
terms of Part II (Co. Br. 58–67) the Company in
argument, recently presented to this Court in *F. P. C.
Edison Co.*,[13] that inasmuch as the energy crosses the
Nevada boundary on facilities owned and operated b
owned agencies exempted by Section 201(f), that
the two-state journey of the energy must be treate
existent, and the remainder treated in and of itself
it were *intrastate* (Co. Br. 61–64).

We shall not attempt to pursue the logical dilemma
from the Company's attempt to treat its own trans

ntroverted evidence in the record that one could not hout the other (R. 304, 307–309). But assuming, , that this logical impasse could be surmounted, the 's argument is based on a clear misreading of Section That Section provides that no provision of Part II *ly to the enumerated public agencies.*[14] It cannot, doing violence to its express terms, be "interpreted" as read, *apply to activities* of the public agencies, mak- transactions nonexistent for the purpose of determin- pplicability of Part II to others who are not publicly

rmore, the argument overlooks the clearly applicable Section 201(c) that "electric energy shall be held to nitted in interstate commerce if transmitted from a d consumed at any point outside thereof." By this nd unequivocal definition, written into the same Sec- subsection 201(f), Congress has made transmission tate commerce wholly independent of the ownership ilities by which it is accomplished.[15]

Senate hearings on the bill which subsequently became Part II, nce to Section 201(f) by Mr. DeVane, then Solicitor of the n, and one of the draftsmen of the bill, confirms the intention the public agencies, not to create "a negative domain so far as concerned and an activity of which no notice is taken" (Co. Br. DeVane stated (Senate Hearings on S. 1725, 74th Cong., 1st Sess.,

ANE. We did not feel that it was within our province to prepare would undertake to regulate municipal, State, or Government

as all governmental projects are concerned, our approach to the s that in the legislation creating those authorities and giving orities their powers, this Congress had provided the power that those agencies to have, and it did not seem to us that it was attempt to bring those other governmental agencies under the of the Federal Power Commission; so that in our preparation we have left them out, and they are outside the pale of this bill.

BARKLEY. On the theory that it is not necessary for the Govern- ulate itself?

ANE. That is right."

ompany (Co. Br. 64) relies on *Idaho Power Co.* v. *F. P. C.*, 189

At the time of the enactment of the Federal Pow
1935, although sales of electric energy or natural gas
in one state, transmitted or transported into another,
consumed, had been held subject to state regulation
sales were made *by* a local distributor to ultimate c
(*Pennsylvania Gas Co.* v. *P. S. C.*, 252 U. S. 23; *P*
Landon, 249 U. S. 236), they had been held consti
exempt from state regulation when made *to* such a loc
utor (*Missouri* v. *Kansas Gas Co.*, 265 U. S. 298; *P*
Attleboro S. & E. Co., 273 U. S. 83). To fill the resu
in electric utility regulation Congress, following th
demarcation which seemed indicated by those cases,
federal regulation for sales in interstate commerce
but not for sales at retail in local distribution.[16]

---

regulatory action by F. P. C." If the *Idaho Power* case sto
proposition, it still would fall short of supporting the argumen
Company must make to prevail on this point, *i. e.*, that the
public agencies are activities "of which no notice is taken" (C
that is, are legally nonexistent—for the purpose of determining
of a privately owned "public utility" to Part II regulation. Bu
Power case does not even stand for what the Company says,
this: that under Section 201(b) Idaho Power Company could
pelled to "wheel" power on the application of the United State
201(f); hence, that it cannot be compelled to "wheel" for the U
by a license condition under Section 10(g) because that Section
conditions "not inconsistent with the provisions of this Act."

It may be added that the Commission deems the decision of th
erroneous and has petitioned the Supreme Court for a writ o
The petition has not been passed on at the time this brief goes t

[16] The Senate Committee Report (S. Rep. No. 621, 74th Cong
p. 48) states the matter as follows: "Subsection (b) defines t
this part of the act and the jurisdiction of the Commission. It
apply to the transmission of electric energy in interstate co
sale of energy at wholesale in interstate commerce * * *
not apply to the retail sale of any energy in local distribution
section leaves to the States the authority to fix local rates ev
where the energy is brought in from another State. In *Penns*
Co. v. *Public Service Commission* (252 U. S. 23), the Supreme
that such rates may be regulated by the States in the absence
legislation. The present bill carefully refrains from asserti

e the clearly defined area thus excluded by Congress
nmission regulation so as to exclude these sales from
ion jurisdiction without regard to the fact they are
he kind of sales Congress intended to regulate because
ionally beyond state regulatory jurisdiction under the
erred to. But that these sales are basically indis-
ible from the sale held constitutionally exempt from
ulation in the *Attleboro* case is tacitly conceded by the
. For in its sole effort to avoid that case (Co. Br.
he Company relies on its argument that licensees are
rom Sections 205 and 206 *because Congress in the*
of its powers over public lands had provided for state
n of their rates under Part I. Its distinction is that
which was there involved was not a sale subject to
Congressional provision for state regulation, thereby
onceding that in the absence of such Congressional
, these sales, like that in the *Attleboro* case, are the
stitutionally not subject to state regulation. (We
where, *supra,* pp. 11–16, *infra,* pp. 32–40, that by Sec-
hese sales were subjected to Federal, not state regu-
ence, even this attempted distinction fails.)

tilities Commission v. *Attleboro Steam & Electric Co.* (273 U. S.
beyond the reach of the States. Jurisdiction is asserted also
terstate transmission lines whether or not there is sale of the
ried by those lines * * *. Facilities used only for intrastate
or local distribution are expressly excluded from the operation

se Committee Report (H. Rep. No. 1318, 74th Cong., 1st Sess.,
ates: "The new parts are designed to meet the situation which
reated by the recent rapid growth of electric utilities along in-
es. The percentage of electric energy generated in the United
was transmitted across State lines increased from 10.7 in 1928
933. The amount of energy transmitted in interstate commerce
s greater than all of the energy generated in the country in 1913.
decision of the Supreme Court of the United States in *Public*
ommission v. *Attleboro Steam & E. Co.* (273 U. S. 83), the rates
interstate wholesale transactions may not be regulated by the
rt II gives the Federal Power Commission jurisdiction to regulate
A 'wholesale' transaction is defined to mean the sale of electric
resale and the Commission is given no jurisdiction over local

other grounds is compelled by the absence of any facts it could be distinguished. Clearly the fact that deliv these sales is made at a point located 18 to 25 mil the state boundary is crossed (R. 321, 292), instead boundary, will not suffice. The courts have co reached the same results regardless of where title ch to sale [17] and transmission [18] in the state of produ the state boundary,[19] and as to transmission [20] and sal state of consumption after the state boundary has bee

The sales here are, therefore, precisely within the of Congress in enacting Part II and the only questi considered are whether the quirk of statutory drafts or the particular factual circumstances of the Navy relied upon by the Company, stand in the way of out that purpose.

1. The Literal Definitions of the Statute Were Properly Treate Commission As Not Excluding These Sales

Reviving an argument which had been consistently by the Commission in previous cases [22] and overr *silentio* by the Supreme Court,[23] the Company, before mission and in this Court (Co. Br. 59–61), tacks the of "sale at wholesale" in Part II (Section 201(d)), "to any person for resale," to the definition of "p Part I, as excluding the United States and a county agency (Sections 3(4), 3(3), 3(7)), with the literal r

[17] *Interstate Natural Gas Co.* v. *F. P. C.*, 331 U. S. 682, 687–688
E. L. Co. v. *F. P. C.*, 131 F. 2d 953, 958 (C. A. 2), *certiorari denie* 741; *Peoples Natural Gas Co.* v. *F. P. C.*, 127 F. 2d 153, 155 (C

[18] *Jersey Central P. & L. Co.* v. *F. P. C.*, 319 U. S. 61, 69.

[19] *P. U. C.* v. *Attleboro S. & E. Co.*, 273 U. S. 83; *F. P. C.* v. *H Gas Co.*, 320 U. S. 591, 594.

[20] *F. P. C.* v. *East Ohio Gas Co.*, 338 U. S. 464.

[21] *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498; *Colorad Gas Co.* v. *F. P. C.*, 324 U. S. 626, 630–631.

[22] *Otter Tail Power Company*, 2 F. P. C. 134, 136–140, 33 PUR N 269; *Connecticut Light & Power Company*, 3 F. P. C. 132, 144, 4 170, 178–179; *Otter Tail Power Company*, 8 F. P. C. 393; See also *Angeles* v. *The Nevada-California Electric Corp.*, 2 F. P. C. 10

of the legislative history of these definitions will show
iteral result is a quirk of draftsmanship utterly unin-
while a consideration of the policy of the legislation
e will make plain that this is, as the Commission has
held, a proper case for following the purpose of the
ther than the literal words. *United States* v. *Ameri-
cing Associations,* 310 U. S. 534, 543, and cases cited;
tates v. *Rosenblum Truck Lines,* 315 U. S. 50, 55.
se circumstances, the course of consistent interpreta-
e Act by the agency charged with its administration is
weight. *Norwegian Nitrogen Co.* v. *United States,*
294; *United States* v. *American Trucking Associa-*
U. S. 534, 549; see Gellhorn, Administrative Law
Comments (2d Ed., 1947), p. 204.

roduction into the definition of "wholesale sales" of
"person," which had an artificially restricted defini-
ction 3 of Part I, had no purpose in itself but was
incident to a rephrasing which cured an obvious de-
nother aspect of the previous wording. Under the
vording, the definition of wholesale sale did not use
'person." [24] That word first made its appearance in
eported by the House Committee. But the House
e report, in commenting on the changed definition in
erely stated that "A wholesale transaction is defined
he sale of electric energy for resale * * *" (H.
1318, 74th Cong., 1st Sess., p. 8), not using the word
Furthermore, the report expressed no purpose that
unicipalities were to be exempted. This is signifi-
where an exemption was intended, the report expressly

ate definition (slipped into the bill by amendment from the Sen-
Cong. Rec. 8858) provided that "Electric energy shall be held
t wholesale in interstate commerce within the meaning of this
hen it is sold for resale after its transmission in interstate com-
ore such transmission if the same is thereafter so transmitted."
ition contained a "joker." It covered wholesale sales before
terstate transmission, but omitted sales made in the course of
ission, and would have made the Act inapplicable to the very

intended to broaden the Senate definition which it
lends additional support to the view that "person"
201(d) was not intended in the artificially restricte
of Section 3.[26]

When we turn to the legislative history of the de
Section 3 of Part I, which literally fix the meaning o
it is likewise plain that there was no Congression
thereby to exempt sales of the kind here involved.

Section 3(4) defines person as "an individual or co
which would, literally, eliminate the Navy.[27] Fu
Section 3(3) in defining "corporation" expressly excl
from a "municipality" which is defined in Section
clude a county or agency of a state competent und
thereof to carry on the business of transmitting or
ing power—hence literally excluding Mineral Coun

This definition of "person" was added to Sectio
original draft of the 1935 amendments, along with
of certain other terms. It, therefore, could not ha
tended originally to affect the meaning of "whol
which, as we have seen, was not defined in languag
term "person" until later. The "usefulness" of the ad
tions was said in the Committee Report to be "obvi
no further explanation was given.

It seems only reasonable to conclude that when the
of "wholesale sale" in Section 201(d) was rewrit
House, the word "person" was used without awaren
draftsmen of the artificially restricted meaning whic
given that word in the original bill.

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[25] Thus, immediately following the restatement of the definit
sale sales, the report added (*ibid.*) "and the Commission is gi
diction over local rates even where the electric energy moves
commerce."

[26] The Conference Committee adopted the House definition
ment. H. Rep. No. 1903, 74th Cong., 1st Sess.

[27] See the portions of our brief in *United States* v. *F. P. C.*
(C. A. 4) Nos. 6273, 6274, decided October 1, 1951, quoted in th
brief in this case (pp. 59–61).

[28] Sen. Rep. No. 621, 74th Cong., 1st Sess., p. 42. A simil

ve turn from the silence of the legislative history as to
tion to provide the exemption claimed by the Com-
a consideration of the policy of the Act as a whole, it
at such an exemption would thwart the over-all pur-
ne legislation.

Commission stated in *Otter Tail Power Company*
C. 134, 137, 33 PUR NS 257, 260) it would mean that
may not discriminate in rates charged private persons
ations, but is at complete and unfettered liberty to
n the rankest discrimination as between municipali-
s between private customers and municipalities, re-
ne same service." It is hardly likely that Congress
to deprive consumers served by the thousands of
lly owned distribution systems, of the protection it
ding from unjust and unreasonable interstate rates.
sult would be completely at variance with the basic
f the rate provisions of the Act, which were designed
ne gap" in rate regulation disclosed by *P. U. C.* v.
S. & E. Co. (273 U. S. 83). See *Jersey Central P.*
v. *F. P. C.*, 319 U. S. 61, 67–68, 71, 80–81.[29] With
ose even critics of the proposed legislation were in
t.[30]

rmore, to adopt the Company's contention would fail
bstantial effect to other provisions of the Act, *e. g.*,
06, allowing a municipality to file a complaint on
"anything done or omitted to be done by any licensee
utility in contravention of the provisions of this Act,"
on 313(a), permitting review of Commission orders

ally it might appear that "filling the gap" on sales to munici-
uld be a futile thing with respect to the energy resold by
es at wholesale, since that resale is exempted from the Act.
sales were recognized to be of rare occurrence; and in any
or purposes of private profit, so as to fall within the normal
te regulation. Hearings, House Committee on Interstate and
mmerce, on H. R. 5423, 74th Cong., 1st Sess., pp. 569, 570, 2061–
ngs, Senate Committee on Interstate Commerce, on S. 1725,
st Sess., p. 256.

s, House Committee on Interstate and Foreign Commerce, on
74th Cong., 1st Sess., pp. 647, 48, 851, 1059, 1068, 1560, 61, 1612,

mission further observed in *Otter Tail Power Compa*
p. 23) "Since the most serious, if not the only real
a municipality could have against a public utility wou
the rates charged it for electric energy at wholesale
mission has no power to regulate the retail rates o
utility), it is most persuasive Congress intended tha
jurisdiction over such wholesale rates."

We may conclude this point by calling attention ag
Connecticut L. & P. Co. case (*supra*, p. 20, n. 23). In
the Connecticut L. &. P. Co. had made a similar
against one aspect of the Commission's order there
view. In reply the Commission's brief advanced ma
same considerations we have set forth herein.[31] The
Court, while setting aside the Commission's order in
and remanding the matter to the Commission for fu
ceedings consistent with its opinion, significantly di
that the Commission was in error as to its jurisdiction
to municipalities (324 U. S. 515, 536), thus overr
silentio the same argument advanced by the Compa

2. The Particular Circumstances of the Navy's Resale We Treated by the Commission as Not Excluding the Sale to

The Company contends (Co. Br. 64–67) that the s
Navy is not "for resale" within the definition of "
sale" in Section 201(d) because (a) the Navy resell
rate, principally to Navy personnel, civilian emplo
concessionaires at a housing development located o
reservation; (b) only 25 percent of the amount sold to
by the Company was delivered to those customers; a
Company's former contract with the Navy made no
to resale by the Navy and the Company does not int
for resale. Here again the Company's objections wil
to lack substance.

a. The Navy Makes "Resales" of Energy Sold to It by the C

Regardless of who the Navy's purchasers are, wh

ier they are regulated by any other agency, on the rec-
whole the Commission was clearly warranted in finding
h energy "is resold to ultimate consumers and consumed
ada" (R. 107). The responsible civilian official and
fficer testified to such resales (R. 270–279, 288–291,
), testified that they were metered deliveries made
ritten contracts, typical examples of which were pro-
s exhibits and made part of the record (R. 541–552), at
1½ cents per kwhr.[32] Typical examples of the receipts
r payment were also produced as exhibits and made part
ecord (R. 553–554). That these are "sales" as much
made by the usual local electric utility appeared fur-
m the testimony that the only reason the service
rendered by the local electric utility (Mineral County)
latter's financial inability to undertake the business
293). All of this evidence was uncontroverted.
Company's argument (Co. Br. 65–66) that the purpose
II was limited to enabling "State agencies to start with
holesale rate in regulating the local distribution rate"
t II should, accordingly, be held inapplicable because
y's local distribution rate is not regulated by a state
is not supported by any citation of authority. Ob-
the Company has cut its coat to fit its cloth. The
on is in conflict with the Commission's consistent in-
tion of the rate regulatory provisions as being intended
enefit of consumers, including those served by munici-
ibuting utilities, which are usually not regulated by
encies (*supra,* pp. 20–24). It also ignores the fact that
me of the enactment of Part II in 1935, even privately
ocal distributing utilities' rates were not subject to
on by state agencies in seven states,[33] yet it would

---

verage monthly consumption by tenants in the Babbit public
uarters was 182 kwhr (computed from R. 539) for which the
d $2.73. At Las Vegas, Nevada, he would pay $3.47, Boulder City,
3.62, and Henderson, Nevada, $3.48 for the same amount. But
hr he would actually pay less at each of the other three Nevada
the Navy charges. These comparisons are made from figures

subject to Commission jurisdiction in those seven stat
finally, in arguing that federal regulation of the rat
the Navy "would be of no effect whatever" because
tary authorities may charge any rate "they desire"
66), the Company wholly overlooks the basic fact
public interest in the Company's rate to the Navy is
tially the same, whether the burden of excessive r
to fall first on the ultimate consumers of that ener
rectly on the taxpayers.

b. Resale of an Indistinguishable 25 Percent of the Energy Sold Commission Regulation of the Sale

The Company argues (Co. Br. 66) that it is imp
see why sale of the 25%[34] resold by the Navy should n
Commission regulation on the theory that the 2
its identity in the 75% which is not resold, and the
the larger percentage should determine the treatme
whole.

Here again the Company's objection is basically a
one, having been raised in some form and at some
practically every proceeding in which the Commissio
diction under Part II has been contested. The "pu
ities" brought under Commission regulation by Pa
typically companies whose income is derived predo
from ultimate consumers and intrastate sales; the en
handle is often predominantly energy produced and
in the same state, with an indistinguishable admixture
state energy; their sales of energy moving interst
include indistinguishable admixtures of energy movi
intrastate; and the facilities found to be jurisdictiona

[34] The Company's figure of 25 percent is apparently a roundin
percent shown by R. 270, for the year 1949. (The Commissio
percentages ranged from 15.4 percent to 28.6 percent for the ye
1948, inclusive, in parts of findings, R. 90, 105, not objected
114–115.) That evidence shows that the 24 percent does not in
properly attributable to that 24 percent and we believe the
not show what those losses were. In this connection we ma

ixtures. Attempts have been made to ground ob-
o various forms of Commission regulation on such
But in no instance where the Commission has asserted
on in the face of such an objection has the objection
ained by the courts. Where the courts' opinions
ed the objections they have overruled them. *Jersey*
. & L. Co. v. *F. P. C.*, 319 U. S. 61, 66–67, *affirming*
183, 186–189 (C. A. 3) (where the energy flows are
y described); *Connecticut L. & P. Co.* v. *F. P. C.*,
515, 535–536; *Hartford E. L. Co.* v. *F. P. C.*, 131
3, 958 (C. A. 2), *certiorari denied*, 319 U. S. 741;
ania W. & P. Co. v. *F. P. C.*, — F. 2d — (C. A. D. C.
36, 10,239, 10,531), decided July 3, 1951 (slip sheet,
3), *certiorari granted*, February 4, 1952. See also
Natural Gas Corp. v. *P. S. C.*, 119 F. 2d 417 (C. A. 6)
28 F. Supp. 509 (D. C. E. D. Ky.). This unvaried
cisions is consistent with the earlier decisions denying
sdiction over sales of *mixtures*.[35a]

l take space to discuss only two of these cases. In
ecticut L. & P. case, *supra*, the Commission found that

—

Kansas Gas and Electric Company, 1 F. P. C. 536, 543–544, 26
9; *Hartford Electric Light Company*, 2 F. P. C. 359, 365–366,
193, *affirmed*, 131 F. 2d 953 (C. A. 2), *certiorari denied*, 319
Chicago District Electric Generating Corporation, 2 F. P. C. 412,
NS 263; *Connecticut Light & Power Company*, 3 F. P. C. 132,
PUR NS 170, *set aside on other aspects*, 324 U. S. 515; *Safe*
ter Power Corporation, 5 F. P. C. 221, 235, 66 PUR NS 212,
9 F. 2d 179 (C. A. 3), *certiorari denied*, 339 U. S. 957; *Pennsyl-*
& Power Company, 8 F. P. C. 1, 12–17, 82 PUR NS 193, *affirmed*,
— (C. A. D. C. Nos. 10,236, 10,239, 10,531), decided July 3, 1951,
granted, February 4, 1952; *Florida Public Utilities Company*,
189, issued January 25, 1950, pp. 11–15 (mimeo.); *Arizona*
pany, Inc., Opinion No. 190, issued March 31, 1950, pp. 6–7, 9,
), 84 PUR NS 3; *Western Light and Telephone Company, Inc.*,
199, issued September 20, 1950, pp. 1–3 (mimeo.), 87 PUR NS
nsin Michigan Power Company, Opinion No. 213, issued June
6–10 (mimeo.), 89 PUR NS 97, petition for review filed C. A. 7
4, 1951.

ri v. *Kansas Gas Co.*, 265 U. S. 298; cf., *P. U. C.* v. *Landon*, 249
While those sales, both made in Kansas, consisted principally

its ownership and operation, in addition to three o
of facilities, of a 14-mile, 33 kv transmission line
tenances, running from Montville on the west
Thames River above New London to Groton Long P
east side of the river at its mouth, all in the State o
cut. There it had sold an average of 4,634,212 kwh
a year[36] to the Borough of Groton. The Borou
resold an average of 1,368,412 kwhrs a year, or 29
its purchases, to a privately owned utility which
it by submarine cable under Fishers Island Sound
Island, New York, and there distributed and resol
mate consumers. The Commission held that the 3
mission line was a facility for transmission of elec
in interstate commerce. The Company objected c
of the relatively small amount of interstate energ
which it sought to emphasize by comparing to the
total system energy. Although the Supreme Cou
the Commission's order on other grounds, it rejecte
tention (324 U. S. at pp. 535–536):

> Another contention made by the Compa
> shortly disposed of. It is contended that th
> energy passing over certain of these facilit
> nificant in proportion to the total. Only
> fifth of one per cent of all the energy receiv
> erated by the Company throughout the
> Connecticut was transmitted out of the state
> time of the connection of Fishers Island wi
> ough of Groton. Congress appears to have
> Commission's sound administrative discretio
> mine whether or not to assert its authority i
> ations. Congress annually receives a report
> mission's work and appropriates the fu
> continuance. If it thinks the Commission
> tending its attention to trivial situations i
> means of control in its hands. The wisdom
> is not our concern, but only its legal justific

n of the Commission upon any particular volume or portion of interstate energy involved, and we do not nk it would be appropriate to supply such a jurisdic- nal limitation by construction.

Penn Water case, *supra,* the petitioners objected to nission's order, insofar as it regulated Penn Water's ree Pennsylvania utilities, that not over 17 percent rgy delivered to those utilities had originated out of that the sales of the total should, therefore, be held state regulation and outside the Commission's rate n.[37] The Court of Appeals rejected the objection in of its opinion cited above on the ground that the iginating out of state was electrically and economi- stinguishable from that originating within the state vered.

dence in the present case is likewise plain and uncon- that the energy resold by the Navy is indistinguish- the rest of the energy in the sale to the Navy The "services * * * have always been lumped one bulk sale," according to the voluntary stipulation ny counsel (R. 273). In fact, to distinguish it would separate, parallel transmission line from the delivery Hawthorne, 50 miles distant, so that one line could be rry the resale load exclusively (R. 313).

Provision for Resale Is Unnecessary to Constitute the Sale a "Sale for Resale"

mpany argues (Co. Br. 67) that its sale to Navy is for resale because it "has never agreed to sell energy for resale * * *," and cites part of a dictionary quoting Kipling in an effort to establish that contract ent or Company intention that the energy shall be equired.

gain, the cases are against the Company, particularly f the fact of its knowledge of the transmission out of resale (knowledge found by the Commission in parts

R. 114–115). *Jersey Central P. & L. Co.* v. *F. P. C.*, 61, 68–73; *Hartford E. L. Co.* v. *F. P. C.*, 131 F. 2d 953, (C. A. 2), *certiorari denied*, 319 U. S. 741.

D. These Sales Are Not Excepted as Sales Made Local Distribution"

Thrown in with the Company's contentions which h considered, above, is another familiar argument: th sales are not within the Commission's jurisdiction be the Section 201(b) exception from Commission jurisd "facilities used in local distribution" (Co. Br. 62–63 difficult to imagine a case in which the argument apposite.

The Company's inadequate treatment of the point r effort even to suggest any legal theory by which the s exception of *facilities* is to be transmuted into an exc *sales*.[38] It offers no rationalization of its attempt to from the Commission's jurisdiction sales indistinguisha the *Attleboro* and *Kansas Gas Co.* sales (*supra*, p. 18), it was the constitutional impotence of the states to such sales which was the principal reason for the enac the rate provisions of Part II, as we have shown (*supr* n. 16). The Company seems to make its contention transmission facilities here involved, which carry ene tances up to 80 miles on the Company's system (R. 1 and fifty miles and more further on the purchasers' syst 231, 292), from isolated hydro plants to remote comm constitute "local distribution," in complete disregard holding of the Supreme Court in *F. P. C.* v. *East Ohio* (338 U. S. 464, 469–470). There under parallel prov the Natural Gas Act[39] the Court held:

> But what Congress must have meant by "fa for "local distribution" was equipment for dist

[38] It is an elementary rule that exceptions from a general polic law embodies should be strictly construed. *Interstate Natural G F. P. C.*, 331 U. S. 682, 690–691; *Spokane & Inland R. R.* v. *Unit*

unity, not the high-pressure pipe lines transporting the
s to the local mains.

ermore, the Company makes no effort to reconcile its
at the 55 kv facilities here involved are used in local
ion, with its admission that exactly similar facilities [40]
mission to Nye and Esmeralda Counties, Nevada, are
o the Commission's jurisdiction (Co. Br. 6), hence not
ocal distribution.

o the Company does not even suggest any want or
cy of factual support for the Commission's findings
Company's facilities used in making these sales are
lities used in local distribution (R. 98–99, 108).
no such suggestion could be sustained in view of the
verted testimony of the Commission's engineer who
investigation and study of the facilities and their
n (R. 337). His testimony finds corroboration in the
s references showing the prevalent practice in the in-
distinguish facilities used in "distribution" from the
ilities here involved—in Company contracts (R. 589,
606, 608–609, 610–612), in the Navy "Permit" to Min-
nty (R. 522), in testimony (R. 268), and in the very
dules prescribed by the California Commission which
pany seeks to apply to these sales (R. 483–484, 485–
his evidence, too, was uncontroverted.

cluding this point we may note that the Company's
t, based on its description of the 55 kv facilities as serv-
ctly or indirectly" all of its local customers in Mono
Co. Br. 8; *cf.* 26, 62–63) would make the entire indus-
pt from regulation under Part II. For there is not a
r or transmission facility, anywhere, that does not
or indirectly" serve local customers. That is what all
ilities of electric utilities are "for." The exception is
es "used in" local distribution.

g answered each of the four claims advanced by the
y in its attempt to avoid Commission jurisdiction un-
II, we are now able to answer somewhat more

under Part I.

II

THE OBJECTIONS TO COMMISSION JURISI UNDER PART I ARE WITHOUT MERI

The Company's objections to Commission jurisdic these rates under Part I (Co. Br. 45–57) all depend upon the assumption that Sections 19 and 20 autho regulation, under the usual state regulatory statutes, state wholesale rates like those here involved, which, a already shown, in the silence of Congress are beyond stitutional power of the states under the decisions in v. *Kansas Gas Co.*, and *P. U. C.* v. *Attleboro S. & E. C* p. 18). Therefore, before undertaking to answer the lar objections advanced by the Company, we shall s whatever other doubts there may be as to this assur any state regulation of interstate wholesale rates wa ized in Part I, it was enforcement of Section 20 sta regulation by agreement of the states directly concer

We may begin with the historical fact that Sectio 20 were enacted without legislative attention being to any constitutional inability of the states to regulate electric energy sold in interstate commerce, even at w This is reflected in Sections 19 and 20 by the absen distinction, like that in Part II, between sales at whol sales at retail in local distribution. The principal d drawn in Part I is that between sales (both at retail a sale) in which the power enters interstate commerce, Section 20 applies, and all other sales which are left s Section 19. Upon this distinction two differences ha we shall discuss below: Section 20 contains a substa vision, not found in Section 19, that interstate rates a "shall be reasonable, nondiscriminatory, and just and all unreasonable discriminatory and unjust rates c are hereby prohibited and declared to be unlawful"; S also provides that "whenever any of the States dire

r such States are unable to agree through their prop-
uted authorities on the services to be rendered or
s or charges of payment therefor, * * * juris-
ereby conferred upon the commission * * * to
provisions of this section * * *."

aking up those provisions, it should be noted that
cisions which pointed up the constitutional restric-
ate commission power to regulate wholesale rates
e commerce had not been handed down at the time
inal enactment of Part I in 1920. There was of
commerce clause itself with its well known genesis
pose to prevent individual states from regulating,
efit of their several interests, *e. g.*, as producer or
states, or as competitor states, "commerce which
ore states than one." [41] There was also *The Daniel*
10 Wall. 557), establishing that even an intrastate
interstate journey is subject to Federal regulation.
) state utility regulation of local retail distributing
rates for natural gas originating out of state, where
under the commerce clause, had been upheld con-
P. U. C. v. *Landon*, 249 U. S. 236; *Pennsylvania*
P. S. C., 252 U. S. 23.

v. *Kansas Gas Co.* (265 U. S. 298), which was to
tate wholesale rates for natural gas to be outside
r, was four years in the future. And *P. U. C.* v.
. & E. Co. (273 U. S. 83), which would for the first
to a focus the problem of the constitutional inability
es to regulate interstate wholesale rates in the elec-
industry, lay seven years in the future.

ing Sections 19 and 20 Congress was, therefore, not
itself to any problem calling for the vesting in the
ower constitutionally withheld from them in the

. *Ogden*, 9 Wheat. 1, 194, 224–225; see *United States* v. *South-
erwriters Asso.*, 322 U. S. 533; Stern, That Commerce Which
re States Than One, 47 Harv. L. Rev. 1335, 1361; II Farrand,
of the Federal Convention (Rev. Ed. 1937) 308, 441; III
478, 519, 547, 548; The Federalist, No. XXII (Everymans

whatever power they had, making clear that federa
were not, by virtue of their status as federal licensees,
from state regulation.[43]

This is shown very clearly by the testimony, in t
Committee hearings, of Mr. O. C. Merrill, prese
views of the Administration on behalf of the Admi
bill.[44] Mr. Merrill's testimony is clear that the Ad
tion, in proposing the bill, assumed that the states c
late all the rates involved in Section 20, and that
was intended to be "left" with the local authorit
extent they had the power of regulation, and not
thorized beyond that.[45]

But Congress perceived that, even as to regulatio
rates for interstate energy in local distribution, as
the state regulatory jurisdiction was clearly establ
interests of the states directly concerned might be in
each state wanting as much of the benefits from low c
electric generation as possible for its own citizens, i
or another (*infra,* pp. 54–55). Against that likelihood
haps as well against any possibility of constitution
regulatory power in the states over other interstate r
gress provided in Section 20 the standard which shou

---

[42] Contrast the clear manifestation in other statutes of C
purpose affirmatively to permit application of state authority
transactions constitutionally withheld, in the silence of Cong
Rahrer, 140 U. S. 545, 549, 562; *Clark Distilling Co.* v. *Weste*
Ry. Co., 242 U. S. 311, 321, 332; *Whitfield* v. *Ohio*, 297 U. S. 4
Kentucky Whip & Collar Co. v. *I. C. R. Co.*, 299 U. S. 334, 34
dential Life Insurance Co. v. *Benjamin*, 328 U. S. 408, 429–431.

[43] See *Broad River P. Co.* v. *Query* (288 U. S. 178, 180) for a
tention by a licensee that as such it was exempt from state

[44] Mr. Merrill's testimony is quoted in the Commission's opi
Harbor Water Power Corporation (5 F. P. C. 221, 240–242,
212 (1946), *affirmed*, 179 F. 2d 179 (C. A. 3), *certiorari denie*
957). Inasmuch as the Commission's order here under revie
that *Safe Harbor* opinion and "reaffirms" the conclusion th
(R. 95), we have printed the relevant portion as Appendix A
(*infra,* pp. 47–58).

[45] The Company's discussion of Right of Way Acts and D
Regulations prior to 1920 (Co. Br. 27–30) discloses no re

ncerned to administer and enforce that standard by , if they could do so effectively, and provided that ld not, the Commission should.

· that agreement was conceived to be one made under ct clause of the Constitution (Art. 1, Sec. 10, Cl. 3) rely clear. The only Court that has had the ques- ıted to it for decision has held that it was. *Safe P. Corp.* v. *F. P. C.* (124 F. 2d 800, 807–808 (C. A. *ıri denied,* 316 U. S. 663). On the other hand, the nal approval is not consistent with the practice of n giving express and formal approval to interstate [6] and is, in fact, found only in the implication of phrase "or such states are unable to agree." Fur- if Congress intended to give its approval under the lause (Art. 1, Sec. 10, Cl. 3), it was thereby confer- er upon the states to do by such agreements what idually did not have power to do—which was more Merrill's testimony indicates the Administration in- proposing the language.[47]

vever that may be, two things at least are clear from g of Section 20 as to the state action therein contem-) It is the service and rate standard of Section 20 be "enforced"—not a state law standard as in Sec- nd enforced by a "commission or other authority" y a state for the purpose of enforcing that standard est of Section 20); (2) The enforcement of that ıust be the result of agreement upon that enforce- "properly constituted authorities" of each of the ctly concerned.

, *Olin* v. *Kitzmiller,* 259 U. S. 260, 262; *Arizona* v. *California,* , 449; *cf., United States* v. *Arizona,* 295 U. S. 174, 183; see also Natural Gas Act, 52 Stat. 821, 827, 15 U. S. C. §§ 717, 717j.

Congress is to be deemed to have been acting in the exercise utional power with respect to the territory and property of the s (Art. IV, Sec. 3), as the Company contends (Co. Br. 37), or e clause seems largely academic. For Sections 19 and 20 nsees whose projects are located on or affect navigable waters

Commission action. *Safe Harbor W. P. Corp.* v. *F*
F. 2d 179, 191–193 (C. A. 3), *certiorari denied,* 339
Equally clearly, "agreement" by a state agency, s
Nevada Public Service Commission in this case, whi
charged by the State of Nevada with no responsib
thority of any kind whatever as to the regulation o
pany's rates here in question,[48] would be completel
less. It would have no more legal effect than "agre
a state board of medical examiners. As the Third
in the first *Safe Harbor* case (124 F. 2d at p. 806):
intention of Congress that there should be regulatio
trol of hydroelectrical energy and not that impo
bodies would be set up by the states to go through t
of regulation."

Thus, Section 20, by stipulating inability to agree
state agencies as the condition precedent to Commi
lation, made plain that the state regulation intende
lation by the states directly concerned as equals,
assuming the prerogative of regulation, and the oth
of petitioners or protestants before it, as the Compa
(Co. Br. 46–48).

Corroboration of the foregoing interpretation is
the history of the 1935 amendatory legislation. No
there appear any evidence of a belief by Congress i
the Federal Water Power Act had conferred any p
individual states over interstate wholesale rates, or, i
the states had any power from any source over any
On the contrary, it repeatedly appears that Congres
in Part II to confer jurisdiction over all interstate
electric rates, as having been "placed * * * e
yond the reach of the States" by the *Attleboro* cas
Rep. No. 621, 74th Cong., 1st Sess., p. 17). Nowh
reference to that subject in the legislative history
Act have we found any statement or inference that

[48] The Commission found (R. 93–94) that the Nevada Co
no statutory power or responsibility with respect to the fixing

es under Part I.

is understanding of Section 20 we may turn to the objections which the Company urges.

ommission Properly Found That Section 20 Was Applicable

mewhat casual reference [49] the Company seeks to ome objection to jurisdiction under Section 20 that does not "enter into interstate commerce", presumse, as it had urged with respect to Part II, the purandling of the power must be deemed nonexistent ion 201(f). This objection is answered, if answer y, by what we have already said (*supra*, pp. 16–17). er objection to the applicability of Section 20 seems cit in the Company's objection that the Commission noring Section 19 and in not finding these rates subifornia Commission regulation under that Section 6–17, 32, 45). But we think it plain from what we dy said that Section 20 carves an exception from of all cases in which the power enters interstate Hence, if the Commission was correct in finding ower here sold does enter interstate commerce, as we dy shown, the Commission properly treated Section mmediately applicable Section directly involved, so I is concerned.

ommission's Findings Supporting Its Assertion of tion Under Section 20 Were Correct and Fully t

npany also objects to the Commission's findings with its jurisdiction under Part I, contending that "There of properly qualified state commissions in this case

pany only says (Co. Br. 46): "Assuming that interstate comolved (*which Petitioner denies*) it is only necessary (etc.) lsewhere it seems to have conceded the point in formally speci- (Co. Br. 17): "F. P. C. erred, *after finding* [Finding 14; R. 108]

Br. 17), and also seeks to question the adequacy of th
ing of one of the findings (Co. Br. 21).

To be qualified to effectuate the state regulation
plated by Section 20 for these rates there would at leas
be a commission or other authority properly consti
the State of Nevada with power to agree with a co
or authority of the State of California on the enforc
Section 20, as we have shown (*supra,* pp. 36–37). Th
ing of Section 20 as requiring a state authority havin
such power is neither "bizarre" (Co. Br. 52) nor "str
unheard of" (Co. Br. 53) is suggested by the fact that
court cases [50] in which licensees have heretofore clai
state commissions have jurisdiction under Section 20, h
cases which involved the Pennsylvania and Maryla
missions. Both of those Commissions have expres
given such power by their respective state statutes.[51]

Here it is clear that the Nevada Commission is n
tuted with any responsibility or power of any kind a
lation of the Company's rate to the Navy or Minera
(*supra,* p. 6). The Chairman clearly so indicated

[50] *Safe Harbor W. P. Corp.* v. *F. P. C.*, 124 F. 2d 800 (C. A. 3)
denied, 316 U. S. 663; *Safe Harbor W. P. Corp.* v. *F. P. C.*, 17
(C. A. 3), *certiorari denied*, 339 U. S. 957; *Pennsylvania W. & P. C*
— F. 2d —, (C. A. D. C. Nos. 10236, 10239, 10531) decided Ju
certiorari granted, February 4, 1952.

[51] Pennsylvania Public Utility Law, Section 913(a), reads
"The commission shall have full power and authority to make jo
gations, hold joint hearings within or without the Commonwealt
joint or concurrent orders in conjunction or concurrence with
board, commission, or agency of any state or of the United Stat
in the holding of such investigations or hearings, or in the mak
orders, the commission shall function under agreements or compa
states or under the concurrent power of states to regulate the
commerce, or as an agency of the Federal Government, or

Maryland Public Service Commission Law, Section 348, reads
"The Commission shall have full power and authority to make jo
gations, hold joint hearings, and issue joint or concurrent ord
junction or concurrence with any official board or commission of
of the United States, whether in the holding of such investigatio
ings or in the making of such orders the Commission shall fun

246) and the Company points to nothing in the record Nevada Constitution, statutes or decisions as showing ary. The fact so strenuously urged by the Company 50–51), if it is a fact,[52] that the Nevada Commission vered to pass on the rates which Mineral County ts customers in Hawthorne, Luning, and Mina, Necourse has nothing to do with the existence of any au- participate by agreement or otherwise in regulation tes here involved.[53] The Company as much as says t refers to the Nevada Commission as not "being au- to operate extraterritorially" (Co. Br. 52), although t with the California Commission upon that Commisorcement of Section 20 as to these rates involves nothnd Nevada's power as "extraterritorial," if authorized mpact clause (Art. 1, Sec. 10, Cl. 3) of the Federal ion. The Commission was, therefore, abundantly d in finding as it did in its opinion here (R. 95), which porated in and made a part of its order (R. 103):

It is apparent that the Public Service Commission of evada is without authority with respect to rates arged Mineral County or the Navy, and therefore nnot be regarded as a "commission or other authority enforce the requirements of" Section 20, and it follws that no further showing is required to support the nclusion that it is *impossible for a properly constited authority of Nevada to agree with the California ommission* concerning the rates charged Mineral unty and the Navy.

gal sufficiency of this factually uncontested finding to the conclusion that the Commission has jurisdiction

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o the hearing in this case neither the Nevada Commission, the General of Nevada, nor Mineral County were of that opinion or vised, R. 244–249.

mpany's suggestion (Co. Br. 54) that if Mineral County pays rate for the energy it purchases from the Company the Nevada n could refuse to allow Mineral County to charge its customers

ther argument from a mere comparison with the rel
tion of Section 20:

> * * * and whenever any of the States dir
> cerned has not provided a commission or other
> to enforce the requirements of this section w
> State * * * or such States are unable
> *through their properly constituted authorit*
> services to be rendered or on the rates or charg
> ment therefore * * * jurisdiction is he
> ferred upon the Commission, upon complaint o
> son aggrieved, * * * or upon its own in
> enforce the provisions of this section * *

The Company argues (Co. Br. 21) that it was insu
the Commission to find, in Finding No. 16 (R. 108)
rates "are subject to regulation in accordance with
sions of Section 20." The Commission should have
Company says, the words: "by the F. P. C." But ev
lation *by the Commission* is not adequately implied b
No. 16 in the context supplied by Findings Nos.
(that the power enters interstate commerce, that Nev
of the "States directly concerned," and that Nevad
provided a regulatory commission or other authority
the requirements of Section 20 as to these sales), it i
by the Commission's discussion of "our jurisdictio
Part I in its Opinion (R. 92–96), which is expressl
part of the order (R. 103). In any event the Compa
cluded by Section 313 (b) from urging this objection
did not urge it in its application for rehearing before
mission (R. 119–120) when any deficiency in phras
have been easily cured. *Panhandle Eastern P.*
F. P. C., 324 U. S. 635, 649, 650–651.

MISSION PROPERLY REQUIRED THE RATES IED IN THE SPECIFIED CONTRACTS TO BE AND ADHERED TO

the Commission's order here under review as re-nstatement of "contracts which, by or pursuant to , have terminated" (Co. Br. 68), the Company says: *arguendo* that jurisdiction existed, this phase of was arbitrary, irrational and unsupported by law" 0). It goes on to say: "The only proper order in e would be one in the alternative, either to file ase and desist from the service. If rates were then appeared unfair or unreasonable, FPC could have nder Section 205(e) to suspend the rates and enter ring" (*ibid.*).

order plainly does not read as the Company treats s not require reinstatement of the contracts. It ly to the rates on file (or which should have been d merely directs the Company to do that which it ed to do by the Act, and by regulations thereunder e not been questioned. As the Company's counsel greed (R. 223): " * * * in this hearing we ing that it is an unfair rate."

o consider the rate to Mineral County first) the s ordered not to charge Mineral County any rates n those reflected in filed Rate Schedule FPC No. nd unless such schedule is duly superseded by a pported new filing or by a rate prescribed by Com-der" (R. 110–111, *supra,* p. 1). "Rate Schedule 5" is the designation given by the Commission to ny's contract with Mineral County (R. 404) which, ny says, had expired by its terms. That contract iled under Section 205(c) of the Act and Section of the Regulations and designated as "Rate Sched-

R. § 35.3(a): *"Obligation to file.* Every public utility shall with the Commission full and complete rate schedules clearly

of course, are definitions of the service to be ren
the method of computing the consideration to b
that service. Those definitions constitute the "ra
by filing the contract, where there is only one or
customers for the service in question, a company con
with the requirement that it file its rates and tha
contracts affecting or relating to its rates (Section 2

Although the private contract rights and obliga
limited to the three-year term of the contract (sub
effect of paragraph 5 of the contract (R. 408) wh
the contract subject to filing in accordance with the
Rules and Regulations of the Commission) the *rate*
rate, was terminable only by filing and posting a
cancellation as provided in Section 35.5 [55] of the Re

---

such rates, and all contracts which affect or relate to such ra
classifications, or services as required by section 205(c) of
Power Act (49 Stat. 851; 16 U. S. C. 824d(c)). Where two o
utilities are parties to the same rate schedule, each public ut
ing service, transmitting, selling, pooling or interchanging el
shall post and file such rate schedule, or the rate schedule ma
one such public utility and all other parties having an obli
may post and file a certificate of concurrence on the form
§ 131.52 of this chapter."

[55] 18 C. F. R. § 35.5: "*Notice of cancellation.* When a rate s
charge, classification, or service, or any rule, regulation, or c
ing thereto and on file with the Commission is proposed to be
no new rate schedule is filed in its place, except as in this p
each public utility required to file the schedule shall formal
Commission of the proposed cancellation on the form indicated
this chapter at least 30 days prior to the proposed effective
cancellation; and shall therewith submit a statement showin
therefor and that notice has been served upon each utility th
to the rate schedule. A copy of such notice to the Commis
duly posted. For good cause shown, the Commission may per
cancellation to be filed within less than 30 days of the prop
date thereof."

[56] If, under the facts of a particular case, the term of th
deemed to be a part of the definition of the service or consi
therefore part of "the rate," it yields to regulation. For it
held that private contract rights must yield to public autho
constitutional interdiction of statutes impairing the obligation
does not prevent a regulatory commission from abrogating pri

hanged, under Section 205(d) of the Act and Sec-
)[57] of the Regulations only by duly filing a changed
Company had first attempted to file a changed rate
ithdrew its incomplete submittals (*supra*, p. 4).
ently, the rate embodied in the contract continued
led rate and as such continued to be the only legally
e rate. *Montana-Dakota U. Co.* v. *Northwestern*
41 U. S. 246, 251. The service continued to be ren-
the claimed expiration of the contract, but the Com-
and collected therefor amounts in excess of the filed
n, under protest (R. 641), was paid by Mineral
ecause it had no alternative source of energy (R.
doing so the Company had violated, and continued
Sections 205(d) and 20 of the Act and Sections
5.2,[59] and 35.20[60] of the Regulations. Clearly, it
reason of its violations derive the advantage[61] of

Co., 300 U. S. 109, 113–114; *Union Dry Goods Co.* v. *Georgia*
e Corporation, 248 U. S. 372, 375–377; *cf.*, *F. P. C.* v. *Natural*
Co., 315 U. S. 575, 582.

R. § 35.3(c): "*Changes in filed rates, charges, etc.* All rate
king a change in any rate, charge, classification, or service on
Commission, or in any rule, regulation or contract relating
be posted and filed with the Commission not less than 30 days
roposed effective date thereof, unless a shorter period of time
by the Commission; and as to each proposed change there
itted to the Commission: * * *"

57, *supra*.

. § 35.2: "*Effective rates and charges.* No public utility shall
lirectly demand, collect, or receive, for the transmission or sale
ergy subject to the jurisdiction of the Commission, or for the
ation of any facilities subject to the jurisdiction of the Com-
rate or charge different from that prescribed in its rate sched-
les actually on file with the Commission, unless the Commis-
good cause shown, otherwise provide by order."

R. § 35.20: "*Filing.* Every licensee shall file with the Com-
l and complete copy of every rate schedule, tariff, contract, or
nd all supplements thereto, providing for the sale at wholesale
consumption, resale, or any other use whatsoever by the pur-
ctric energy or mechanical horsepower generated or developed
acilities of the licensed project: *Provided, however*, That rate
ntracts, agreements, etc., filed pursuant to the provisions of

mission's power of suspension under Section 205(e)

Under Sections 205(c) and 20, as well as to "ca provisions" of the Act as contemplated by Sectio Commission was, therefore, clearly warranted in f 109) that it was "reasonable and appropriate" to Company to cease and desist from charging any rate the last duly filed, uncanceled, and unchanged rate As the Supreme Court said of the company in the *Dakota U. Co.* case (*supra,* p. 43): "It can claim n legal right that is other than the filed rate * *

As to the rate to Navy, the Company is in no bett from the fact that its violations of the applicabl quirements have continued for a longer time. It ha and continued to be in violation of Sections 205(c) the Act and Sections 35.2,[62] 35.3(a) [63] and 35.20 [64] o by not filing the Navy rate. It sought to change it gally, in violation of Sections 205(d) and 20 by b higher rate, which it did not file. The service contin paid for at the old rate (*supra,* p. 5). The highe therefore no more than something the Company w (unsuccessfully as a matter of fact, and ineffectively of law [65]) to bring about, and the old rate continued rate actually collected at the time of the Commissi The Commission was therefore fully justified unde 205(c), 20 and 309 in ordering the Company to fi previously contracted for and being paid at the ti cease and desist from charging any other than a duly

IV

THE COMMISSION'S RULINGS ON ADMISSIB EVIDENCE AND REFUSAL TO REOPEN THE WERE CORRECT

The Company objects (R. 18–20) to the Trial I receipt in evidence (R. 189) of a letter opinion of th

[62] See note 59, *supra,* p. 43.

idence (R. 111–112) of a letter of the Nevada Com-
. 247–248); also to the Commission's denial (R. 147)
npany's motion (R. 126), at the time of its applica-
ehearing, to reopen the record for the purpose of
nother letter opinion (R. 129) of the Attorney Gen-
vada.

t opinion of the Attorney General as to the jurisdic-
e Nevada Commission over municipal corporations
14) and the letter of the Nevada Commission advis-
er customer (R. 248–249) of Mineral County Power
at the Commission had no jurisdiction over the Min-
ty Power System (R. 247–248) both related to the
estion of the position actually taken by that Commis-
its jurisdiction over Mineral County, and the basis
Testimony concerning that had already been re-
n witness Parker without objection (R. 244).

. Have you been officially advised as to whether the
vada Public Service Commission has any jurisdiction
h respect to the rates charged the Mineral County
ver System?

. Yes. Mr. J. G. Allard, Chairman of the Nevada
blic Service Commission, informed me that his Com-
sion has no jurisdiction with respect to electric rates
ler the statutes of Nevada.

more, it is clear from the Commission's opinion and
at the Commission did not rely on either letter as a
s decision, for its decision deals only with the ques-
e Nevada Commission's statutory responsibility or
o the rates charged Mineral County and the Navy
npany, not Mineral County's retail rates, as we have
pra, p. 39). If the admission of either letter had
eous, it would have been clearly non-prejudicial.
the Commission's order cannot be invalidated for
such evidence in any event, in view of the provision
308(b) that the technical rules of evidence need not

erroneous. Not until a year after the hearing March 21, 1950, briefs having been filed in May, Jun 1950 (R. 14), and the Commission order and opin April 13, 1951 (R. 102, 112), did the Company o 1951 (R. 138) move (R. 126–127) to reopen the re ceive in evidence an opinion of the Attorney General dated April 24, 1950. The motion contained no al showing that the opinion could not have been produ the briefs were filed, the Examiner's Decision and thereto, or the Commission decision. Furthermore of the opinion makes clear that it could have had upon the position previously taken by the Nevada C as to its jurisdiction. The denial of the motion wa clearly not erroneous.

Moreover, the opinion is of a purely legal natu the same questions as to the Nevada Commission's j over Mineral County's retail rates already shown t vant to the Commission's decision, and the Commis its denial on the ground of such irrelevancy (R. 147 of the motion, even if erroneous, could not have be cial, and clearly constitutes no basis for setting aside mission's order.

CONCLUSION

For the foregoing reasons the Commission's order affirmed.

Respectfully submitted.

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Federal Power Commission, Washington

Of Counsel:

LEONARD EESLEY,
FRANCIS L. HALL,

APPENDIX A

om the opinion of the Federal Power Commission, *rbor Water Power Corporation,* 5 F. P. C. 221, 6 PUR NS 212, *affirmed* 179 F. 2d 179 (C. A. 3), *certi-ied,* 339 U. S. 957 (referred to in the opinion part of here under review, R. 93, 95):

* * * *

'arbor, as a "licensee," excepted from the provisions
—Although it owns and operates facilities subject to tion of the Commission under Part II, which bring [236] within the definition of a "public utility," r argues that it should be excepted from the defini-ffect, it seeks to have us construe section 201 (e) as A 'public utility' is any person who owns or operates bject to the jurisdiction of the Commission under *ept licensees.*"

ots to support its contention for an implied excep-uing that such an interpretation gives proper effect lause of the declaration of policy in section 201 (a). ation, in its entirety, reads as follows:

is hereby declared that the business of transmitting selling electric energy for ultimate distribution ie public is affected with a public interest, and that eral regulation of matters relating to generation to extent provided in this Part and the Part next fol-ng and of that part of such business which consists e transmission of electric energy in interstate com-e and the sale of such energy at wholesale in inter-commerce is necessary in the public interest, *such ral regulation, however, to extend only to those mat-which are not subject to regulation by the States.*[8] ics supplied.]

ng upon the clause, "* * * such Federal regulation, how-

Harbor contends, are the interstate rates of "licensee
it says, are subject to the authority of the States di
cerned, to regulate under section 20 of Part I. We ca
either that the last clause of the declaration of policy
201 (a) warrants reading an exception into the un
provisions of the Act, or that the State regulation re
that clause was intended to include the interstate
rates of "licensees."

The only judicial utterance in point which has c
attention, is opposed to Safe Harbor's contention
"licensee," it is impliedly excepted from the defi
"public utility" in section 201. This is found in a
the opinion of District Judge Bard (*Safe Harbor W
Corporation* v. *United States, et al.*, 37 F. Supp. 9
E. D. Pa.), subsequently quoted by the Circuit Co
peals for the Third Circuit (*Safe Harbor Water F
poration* v. *Federal Power Commission*, 124 F. 2d 80
4 at p. 804):

> Part II, as added in 1935, gives the Commi
> diction over the transmission and sale of el
> wholesale in interstate commerce, whether
> licensees.

We feel that we should not read into the Act's clea
of "public utility" the implied exception for which S
contends, because we do not believe Congress intend
the question [237] of the coverage of Part II of the
uncertainties of implied exceptions. We think this i
by the fact that exceptions which were intended b
were expressly stated in subsection (f) of section 201
have heretofore construed most liberally.

Nor do we perceive any adequate explanation of
gress, in providing for the regulation of the rates

Light & Power Company v. *Federal Power Commission*, 324 U
said that it is "* * * one of great generality. It cannot n
and specific grant of jurisdiction, even if the particular grant
sistent with the broadly expressed purpose. But such a declar

vhich are not "licensees" and excepted those "public vhich happen also to be licensees." If, on the other gress had intended to except any "public utility's" wholesale rates, and subject them to regulation by compact, there appears no reason why it should not so for all "public utilities," but there is no pretense ess has done that.

naining doubt that we should reject the claimed ex- a "licensee" from the definition of a "public utility" by an examination of the legislative history of the resentative Rayburn, Chairman of the Committee ate and Foreign Commerce, in reporting the bill for nittee, explained why the prohibition in section s directed against personal profit of officials and f "public utilities" without also naming "licensees," that "licensees" having the requisite qualifications be "public utilities":

he Senate bill includes *licensees* within the provi- s of this section, but inasmuch as *such licensees when rstate operating public-utility companies will be ject to the provisions of the section in any event, nsees have been omitted* from the bill as reported, use of the lack of public interest in those companies ch are not public utilities.[9] [Italics supplied.]

efore, conclude that Safe Harbor owns and operates ubject to the jurisdiction of this Commission under at it is not excepted as a Part I "licensee" from the of Part II of the Act; and that it is a "public utility" he provisions of that Part for the regulation of rates. s us to a consideration of the effect of the rate pro- both Parts on each other where, as here, there is in- mpany subject to both.

ensee-public utility" subject to regulation by this n under the rate provisions of both section 20 and

. *No. 1318, 74th Cong., 1st sess., p. 31.* The conference report

interpreted the condition in section 20, readin
ever * * * the States directly concerned *
unable to agree * * * on the rates," as conveyi
gressional consent to regulation of those rates by
compact. *Safe Harbor Water Power Corporation
Power Commission,* 124 F. 2d 800, 808. In the pres
case, Safe Harbor seizes on that interpretation to ma
gument which we have already considered and
namely, that the language in section 20 precludes th
of jurisdiction by this Commission under Part II,
constitutes authorization for the States to regulate th
interstate compact. On the other hand, Commissi
contend that such conflict requires that the provision
20, as so interpreted, be deemed repealed by implicat
enactment of Part II in 1935, so far as applicable to a
public utility." A necessary alternative to the latt
tion is that the interpretation of section 20 which gi
the conflict should be avoided if possible.

This conflict was not presented and passed on by
in the former proceeding for the reason we have alread
out, *i. e.,* that there, Safe Harbor had not been foun
"public utility," and no assertion of jurisdiction und
had been made by this Commission. Hence, no q
our powers under Part II, or conflict thereof with th
ment of the power of the States under its interpretat
tion 20 was before the Court, as the Court recognize
declared that the matter of jurisdiction under Pa
"immaterial" (124 F. 2d 800, at p. 809):

> * * * whether or not the Federal Power
> sion has jurisdiction over Safe Harbor as a pub
> transmitting and selling electric energy at wh
> interstate commerce under the provisions of
> the Federal Power Act, 16 U. S. C. A. § 824,
> immaterial.

In view of our finding that Safe Harbor is a "publ
as well as a "licensee," this conflict must now be c

egulate rates by interstate compact, or if the conflict voided by giving some other interpretation to that our jurisdiction over interstate wholesale rates does d on the finding that the States are unable to agree, finding is superfluous to our assertion of jurisdiction ion 20. And, of course, if it shall appear that section erly given another interpretation which avoids the at will further support our refusal to read an excep- censees" into the definition of "public utilities" in

by implication.—If there is an unavoidable conflict provision of Part I, as enacted in 1920, and a pro- the Act added in 1935, the Court's opinion in the ceeding makes clear that the later provision repeals by implication. For in another part of that same ie Court, dealing with a conflict between the provi- tion 20, for review of Commission orders by District d the provisions of section 313 (b), for review of such Circuit Courts of Appeal, held that the former had liedly repealed by the latter. Accordingly, we that if section 20 authorizes regulation of a "li- lic utility's" interstate wholesale rates by the States interstate compact, it is to that extent repealed by n by Part II.

onnection, we have noted that Mr. John E. Benton, Advisory Counsel, and for many years General So- the National Association of Railroad and Utilities ners, has gone farther and expressed his belief that the rate-making provisions of Part II, being inconsistent with the rate-making provisions of sec- implication repealed the earlier provisions." *Juris- he Federal Power Commission and of State Agencies ulation of the Electric Power and Natural Gas In-* 945), 14 Geo. Wash. L. Rev. 53, 78.

of conflict between section 20 and Part II.—We wever, believe that the doctrine of repeal by impli-

changes in the regulatory situation between 1920
suggests that no conflict exists and that section 2
II of the Act have purposes to serve which neither
standing alone.

In 1920, electric rate regulation was a matter o
local concern. In the field of electric power, th
widespread interconnection of systems across State
large scale interchanges involving sales at wholesal
was just beginning. Charges for such sales were tre
as costs in fixing rates to consumers, which was th
cern of regulatory activity.

The authority of the States to regulate rates to
for gas which had been transmitted across a State lin
established and qualified in two Supreme Cour
(*Pennsylvania Gas Co.* v. *Public Service Commissio*
23; *Public Utilities Commission* v. *Landon,* 249
But 7 years were to elapse before the Court, in *P*
ities Commission v. *Attleboro Steam & Electric Co*
U. S. 83, would declare that interstate wholesale el
are beyond the jurisdiction of the States.

Acting under these circumstances, Congress soug
with the States whatever authority they had. T
Power Commission was given authority to regulat
power from licensed projects only to the extent tha
had not authorized commissions to provide the nece
lation; or, if any part of such power entered inte
merce, whenever the authorized agencies of States
were unable to agree (secs. 19 and 20). But the a
State agencies was to spring from action by the St
the limits of their own regulatory jurisdiction, whi
ognized rather than expanded by Congress.

[240] Even if advance consent of Congress to agre
tween the States must be inferred from the wo
ever "such States are unable to agree," it is entirel
sary to read into the words an expansion of State po
the grant of permission to agree on matters within

ıe Court in the later *Attleboro* decision. Accord-
e shall see, it was presumed that the existence of
ıissions, where disagreement did not render regu-
ɔrkable, would provide adequate protection of con-
licensed project power crossing State lines. Con-
fore, discerned no need to do more than provide for
ement to control and, absent such agreement, to
ıe Federal Power Commission to regulate the rates.
analysis is borne out by the legislative history of
Representative excerpts from that history, taken
earings before the Committee on Water Power of
of Representatives, 65th Cong., 2d sess., are quoted
. O. C. Merrill, presenting the views of the Secre-
ar, Interior, and Agriculture, with respect to sec-
the bill,[10] is responding to questions from several
the Committee (pp. 66, 67):

r. FERRIS. And so far as interstate business is con-
ed the power of the board to fix the rate is absolute,
think?

r. MERRILL. The intention of the draft was this:
insofar as the local authorities have the power,
exercise it, over rates and service, the Federal com-
ion should leave it alone.

r. FERRIS. That is true, of course, only within the
e.

r. MERRILL. Whether the plants which were regu-
were entirely within the State or whether the lines
ed the State boundaries.

nistration Bill (H. R. 8716). The condition, in section 20 of
: "* * * whenever the States directly concerned have not
individually to take action or are unable to agree through
constituted authorities * * *." The language of the
hanged in the substitute bill recommended by the Committee,
ith that of the Section as later enacted (*H. R. Rep. No. 715,*
sess., pp. 27, 10; see also, *id.*, p. 19, containing this statement
al analysis of the substitute bill reported by the Committee:
er provides that where a State has no authorized authority

jurisdiction?

Mr. MERRILL. I doubt whether they would

Mr. FERRIS. Let us see about that.

Mr. MERRILL. Here is the State of Californ
is the State of Nevada [indicating on map].
lines from a company which has plants in t
California and which transmits and delivers
the State of Nevada, so that the lines cros
boundaries.

Mr. FERRIS. Do you not think the State
could control rates in an instance such as yo
if so, which commission would control, the
in the State of California or the commiss
State of Nevada?

[241]

Mr. MERRILL. They both control; the St
fornia fixes the rates for the service rendered i
of California, and the commission in Nevad
rates for the service rendered in Nevada. Th
doing it now.

Mr. FERRIS. Has any court passed upon t
to fix rates on business initiated between St

Mr. MERRILL. I cannot say whether they h
but the fact is that they are doing it. The
tion obtains in the upper part of the State, w
mission lines cross the California-Oregon bo

* * * *

Mr. FERRIS. I thought that under the bi
the local authorities' power ceased the power
mission would set in.

Mr. MERRILL. Yes. Assuming that this i
commerce in its clearest sense, the bill would
fere so long as the Nevada commission was
everything in its State and the California
regulating everything in its State, unless th

* * That in cases of interstate transmission, so as the regulation is being exercised by the States erned and there is no question of a quarrel or dis- ement and the matter is not brought before the Fed- commission, that the Federal commission will ly keep hands off.

said (p. 68), was—

* on the theory that these are matters of local ern and should be handled by the locality when the ity will and can do it.

the hearing (p. 99), Representative Doremus asked l for his construction of the section "* * * re- jurisdiction that it vests in the commission to be this act over interstate rates." Mr. Merrill re-

y position on that is this—and that is what we in- ed to put into the bill—that in cases such as I men- ed yesterday, which are illustrated here [indicating nap] where a transmission line runs across a State and the same company serves customers in two or e States, that so long as the power of regulation of s and of service is and can be exercised by the local orities it had better be left with the local authorities. ny cases should arise where there is a disagreement veen the authorities of two or more States over ques- s of rate or service regulations, and it could not be ed between those authorities, then it is intended the matter may come before the commission for ement.

excerpt from the colloquy between Representative nd Mr. Merrill indicates clearly that section 20 was a time when the limits of state jurisdiction over sales energy in interstate commerce were still to be de- 01):

should be left with the local authorities,
State commissions?

Mr. MERRILL. If they do it; and they a
now. Similar questions were raised 4 years
the other hearings were held, and I do not
competent to answer them. I know that t
commission, for instance, is fixing the rates
for power which is delivered from plants
[242] in California; I do not know whethe
tion has ever come before the courts as to wh
business is or is not interstate commerce,
meaning of the commerce clause of the C
so that exclusive jurisdiction would be ves
Federal Government, if it wished to exercis

Mr. DOREMUS. It might be a power whic
could exercise, or, if it failed to exercise it, c
in the jurisdiction of the State.

Mr. MERRILL. It is my judgment that so l
satisfactorily handled by the several States it
be left with them.

The *Attleboro* case, *supra,* however, changed the s
declaring that the States could not authorize com
regulate interstate wholesale rates. This created a g
lation except where interstate wholesale transactio
licensed project power. Where licensed project pow
interstate commerce, this Commission had authority
tion 20 because the States could not provide commi
power to regulate rates therefor.

In 1935, Congress, in Part II of the present Act,
gap by extending this Commission's authority to
sales [11] of electric energy in interstate commerce a
for resale.

In view of the foregoing analysis, the failure of C
amend section 20, when it enacted Part II, is unde
For, if Congress in 1935 believed that it had, in 192
the powers of the States so as to permit them to r

ed section 20 to avoid conflict with jurisdiction con-
is Commission under Part II. Instead, it left sec-
hanged and unrepealed because still necessary to
lation of retail rates for interstate licensed project
ates which had failed to provide commissions with
regulate such rates, or where failure of State com-
agree on regulation would otherwise render such
nworkable.

her our search has produced a reasonable interpre-
ection 20 which avoids repeal by implication, or
conflicting part of that section be deemed repealed
ion, the finding that the States are unable to agree
essary condition precedent to our authority under
, for the rates here in question, being interstate
tes held beyond the regulatory power of the States
boro case, *supra,* the condition of section 20 would
ble. Our jurisdiction, therefore, would not be de-
on our finding that the States are unable to agree.
gly, we conclude that the States have no power
on 20 to regulate interstate wholesale rates of "li-
ic utilities" in conflict with our power under Part
we have jurisdiction not only under sections 205
Part II, but also [243] under section 20 of Part I,
e basis of our finding that the States are unable
independently thereof.

Harbor a vested right to have its rates regulated as prescribed by section 20?—One other conten-
ed by Safe Harbor in regard to jurisdiction should
Safe Harbor contends that it cannot be regulated
rovisions other than those in section 20, because it
s license to be a contract, and argues that the effect
3, which saves outstanding licenses from alteration,
h its license, issued subject to the provisions of the
ter Power Act of 1920, is to protect the license from
y Congress without Safe Harbor's consent. It does
that the rate fixed by this Commission under sec-

agency, for that by another. The alteration oppo
one of procedure, and procedural changes may be eff
out consent of the "licensee." [12]

Conclusion.—For the reasons stated, we find and
diction to regulate Safe Harbor's interstate whol
under section 20 of Part I and sections 205 and 206
of the Act. Safe Harbor's motion to dismiss for wa
diction is, accordingly, to be dismissed, and we turn
sideration of the rate to be fixed.

* * * *

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[12] *Pennsylvania Power & Light Co.* v. *Federal Power Commis*
445, cert. den. 321 U. S. 798; *Safe Harbor Water Power C*
Federal Power Commission, supra.